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**Issue Date: 15 August 2003**

CASE NO: 2003-SOX-15

In the Matter of:

DAVID WELCH,
Complainant,

v.

CARDINAL BANKSHARES CORP.,
Respondent.

**ORDER DENYING MOTION IN LIMINE, COMPELLING DISCOVERY, AND DENYING MOTION FOR EXPEDITED RESPONSE**

On June 16, 2003, Cardinal Bankshares Corporation ("Respondent") filed an "Objection to Qualifications of Expert" which I construe as a motion *in limine* seeking the exclusion of testimony by an expert witness identified by David Welch ("Complainant") pursuant to my prehearing order. Complainant filed a response thereto on June 9, 2003. For the reasons stated below, Respondent's motion is denied.

On July 24, 2003, Complainant filed a Motion for *In Camera* Inspection requesting that I review unredacted copies of certain documents which, prior to their production to Complainant, had been partially redacted by Respondent based upon a claim of attorney-client privilege. Respondent filed its opposition to the motion on July 30, 2003, and I thereafter granted Complainant's motion in an order dated August 1, 2003. On August 7, 2003, Respondent submitted for my *in camera* inspection the documents in question. I have now reviewed those documents and, for the reasons stated below, grant Complainant's request to compel disclosure of the redacted information.

On August 12, 2003, Respondent filed a Motion for Expedited Response asking that Complainant be required to respond on or before August 18, 2003 to certain discovery requests it served on Complainant August 12, 2003. Complainant responded to the motion the same day it was filed. For the reasons stated below, the motion is denied.

A. Respondent's Motion *In Limine*.

On May 29, 2003, pursuant to my prehearing order, Complainant designated Timothy P. Chinaris as an expert witness in this case. Complainant also provided Respondent with a copy of the witness's curriculum vitae that same date. On June 16, 2003, Respondent filed a pleading

styled "Objection to Qualifications of Expert" (hereinafter "Mot. *In Limine*") in which it stated:

> Respondent objects to the qualifications of this proposed expert on the grounds that his field of expertise is the law. Having an expert opinion on a legal issue within the province of the court to decide is an improper encroachment on the prerogative of the court.

Mot. *In Limine* at 1-2. An attachment to the motion reflects that: this witness is presently an Assistant Professor of Law and Law Library Director at the Appalachian School of Law in Grundy, Virginia; he has taught various legal ethics and professional responsibility courses; and he previously served as, *inter alia*, Ethics Director for the State of Florida Bar.

On June 9, 2003, Complainant filed an opposition to Respondent's motion. The opposition states, *inter alia*, that Professor Chinaris's testimony is relevant and admissible to the issues presented in this case including Respondent's assertion that allowing Complainant to have his personal attorney with him during meetings of Respondent's Audit Committee would have abrogated the attorney-client privilege enjoyed by Respondent and its attorneys.

As noted above, the sole basis for Respondent's motion to exclude Prof. Chinaris's testimony is that such testimony amounts to "an expert opinion on a legal issue" which I must decide in this case. However, Respondent has misconstrued the substance of Prof. Chinaris's opinion.

According to Prof. Chinaris's June 12, 2003 affidavit, Respondent could have no reasonable expectation that a September 25, 2002 meeting with Respondent's legal counsel and outside auditor, which Complainant declined to attend without his personal attorney being present, would be protected by the attorney-client privilege. *Affidavit of Timothy P. Chinaris* (hereinafter "Chinaris Aff.") at ¶ 17. Prof. Chinaris further opined that Respondent could have no reasonable expectation of confidentiality regarding any statements Complainant might make at the meeting or that Respondent's counsel would provide confidential legal advice to Complainant at the meeting. *Id*. at ¶¶ 29, 20.[1] Finally, Prof. Chinaris also opined: "[I]n the event that Respondent suggests that [Complainant's] interests would have been aligned with those of Respondent at and for purposes of the meeting, the presence of [Complainant's] personal counsel would not have compromised any expectations of attorney-client privilege that might be held by Respondent as against the outside world." *Id*. at ¶ 21.

It is clear from a review of these opinions that each relates to an issue of *fact*, i.e., the reasonableness of Respondent's asserted belief that the presence of Complainant's personal attorney at the September 25, 2002 meeting would vitiate the attorney-client privilege, rather than

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[1] I note that neither the affidavit submitted to me by Complainant's counsel on June 17, 2003 as part of his prehearing submission, nor the affidavit submitted recently as Complainant's "Non-Stipulated Exhibits" (Comp. Exh. 29), contain a paragraph "18."

an issue of *law*, i.e., whether, under the circumstances presented, the presence of Complainant's personal attorney would have abrogated the attorney-client privilege. However, even if Respondent were correct that the opinions at issue are opinions "of law," they would still be admissible. First, formal rules of evidence do not apply to these proceedings. 29 C.F.R. § 1980.107(d) (2003). So long as the opinion is relevant and probative to an issue in the case, it may be considered.[2] *Id*. Second, the rules of evidence applicable generally to proceedings before the Office of Administrative Law Judges of the U.S. Department of Labor permit expert testimony where "specialized knowledge will assist the judge as trier of fact to understand the evidence or to determine a fact in issue . . . ." 29 C.F.R. § 18.702 (2003). The "specialized knowledge" of an expert in legal ethics and professional responsibility would clearly assist me in deciding, if required to do so, whether Respondent reasonably believed the presence of Complainant's attorney at the September 25, 2002 meeting would negate Respondent's attorney-client privilege. For all these reasons, Respondent's motion to exclude this testimony is denied.

B. Redacted Minutes of Audit Committee Meetings.

As noted in my August 1, 2003 order, Complainant previously requested that Respondent be required to produce, for my *in camera* inspection, the unredacted minutes of two joint meetings of the Audit Committees of Cardinal Bankshares Corporation and Bank of Floyd held in September 2002, approximately fifty percent of which had been redacted prior to their production to Complainant during discovery. The documents in question, some portions of which remain redacted, were submitted for my inspection by Respondent on August 7, 2003. In its cover letter accompanying the documents, Respondent asserts that the portions of the meeting minutes not provided to Complainant, with certain exceptions, consist of communications between attendees of the above-referenced Audit Committees and Respondent's attorneys Douglas W. Densmore and Jeffrey Van Doren. *Respondent's August 4, 2003 Letter to The Honorable Stephen L. Purcell* at 1. Both of these attorneys are, according to Respondent, members of the bar of the Commonwealth of Virginia and members of the law firm Flippin, Densmore, Morse & Jessee. *Ibid*. Respondent further states that the previously-withheld portions of these meeting minutes "reveal the purpose of the communication between client and counsel and show that the communication was not made for the purpose of committing a crime or tort." *Ibid*. Additionally, Respondent asserts that the privilege has not been waived and the presence at both meetings of an external auditor does not vitiate the privilege because the external auditor was an agent of the bank. *Id*. at 1-2. Finally, Respondent notes that "a small amount of the material" produced for my inspection remains redacted based on Respondent's belief that such information "is subject to the regulatory privilege of the state banking examiners." *Id.* at 2.

(1) Redactions based on attorney-client privilege.

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[2] Complainant asserts that "[t]he proffered expert testimony will address the legitimacy of Cardinal's 'attorney/client privilege defense' which arose when [Complainant] requested he be accompanied by his attorney when he met with Cardinal's Audit Committee in September 2002." *Claimant's Response to Respondent's Objection to Qualifications of Expert* at 2.

One of the oldest and most widely recognized privileges is the attorney-client privilege, which protects confidential communications made between clients and their attorneys for the purpose of securing legal advice. *Swidler & Berlin v. United States*, 524 U.S. 399, 403 (1998). It is well established that a client may be either an individual or a corporation. *See, e.g., Upjohn Co. v. United States*, 449 U.S. 383, 390 (1981). However, the privilege is to be strictly construed, *National Labor Relations Bd. v. Harvey*, 349 F.2d 900, 907 (4th Cir. 1965), and the party asserting the privilege must affirmatively demonstrate each element of the privilege. *See, e.g., United States v. White*, 970 F.2d 328, 334 (7th Cir. 1992) (blanket claim of privilege insufficient); *United States v. First State Bank*, 691 F.2d 332, 335 (7th Cir. 1982) (proponent of privilege must identify at a minimum general nature of document, specific privilege claimed for document, and facts establishing all elements of privilege claimed).

According to the U.S. Court of Appeals for the Fourth Circuit, in whose jurisdiction this case arises: "Because the privilege protects the substance of communications, it may also be extended to protect communications by the lawyer to his client, agents, or superiors or to other lawyers in the case of joint representation, *if those communications reveal confidential client communications*." *U.S. v. [Under Seal]*, 748 F.2d 871, 874 (4th Cir. 1984) (italics added). The D.C. Circuit has adopted a similar rule. Relying on its decision in *Mead Data Cent., Inc. v. United States Dep't of Air Force*, 566 F.2d 242, 254 (D.C.Cir.1977), that court wrote: "[W]hen the attorney communicates to the client, the privilege applies [to the attorney's statements] only if the communication 'is based on confidential information provided by the client.'" *Brinton v. Department of State*, 636 F.2d 603, 603 (D.C. Cir. 1980).

With the exception of certain statements redacted by Respondent due to "regulatory privilege," discussed more fully below, the communications withheld from Complainant in this case are all statements made by attorneys Douglas Densmore and Jeff Van Doren to attendees of the Audit Committee meetings held September 17 and 25, 2002. However, neither of these attorneys' statements contain *confidential client communications* made by Respondent. On the contrary, the statements made by Messrs. Densmore and Van Doren, in large part, consist of their descriptions of verbal and written communications *made by or to Complainant*, and actions *taken by him*, with respect to his concerns about alleged improprieties at the bank. Furthermore, the September 17, 2002 meeting minutes expressly note that MountainBank Financial Corporation ("MFC"), a third-party entity with which Respondent was then attempting to merge, was to be apprized of the situation involving Complainant, and the September 25, 2002 meeting minutes confirm that MFC had in fact been fully informed of the situation. Respondent has thus failed to meet its burden to establish that the attorney-client privilege applies to the statements of its attorneys and that, even if applicable, the privilege has not been waived by disclosure of the substance of the communications to MFC. *See, e.g., United States v. Jones*, 696 F.2d 1069, 1072 (4th Cir. 1982) ("The proponent must establish not only that an attorney-client relationship existed, but also that the particular communications at issue are privileged and the privilege has not been waived.").

In addition, another aspect of this issue is whether Complainant, who was Assistant Vice

President and Chief Financial Officer of both Respondent Cardinal Bankshares and the Bank of Floyd at the time of the September 2002 meetings, was part of the corporate "client" represented by counsel and would be entitled to waive the attorney-client privilege if it existed. Respondent has consistently taken the position that Complainant's presence *without* his attorney would not have abrogated the attorney-client privilege. Indeed, his status as an officer of Respondent clearly suggests that he is within the group of Respondent's managers who could do so. For example, one court noted that the Chairman of a defendant corporation's Board of Directors was "among those . . . agents with management authority who are entitled to be privy to communications between [defendant's] management and [its] counsel" and was thus entitled to waive the privilege with respect to communications between the company and its counsel. *Gregory v. Correction Connection, Inc.*, Civ. A. No. 88-7990, 1990 WL 182130 at *3 (E.D.Pa. Nov. 20, 1990). Similarly, another court held that nothing in the attorney-client privilege prevented a director of a corporation from "'blowing the whistle' to the SEC, including revealing privileged information, although such conduct could have subjected [the director] to liability to [the corporation] for breach of fiduciary duty." *Wechsler v. Squadron, Ellenoff, Plesent & Sheinfeld, LLP.*, 994 F. Supp. 202, 212 (S.D.N.Y. 1998). According to the Supreme Court:

> [T]he power to waive the corporate attorney-client privilege rests with the corporation's management and is normally exercised by its *officers* and directors. The managers, of course, must exercise the privilege in a manner consistent with their fiduciary duty to act in the best interests of the corporation and not of themselves as individuals.

*Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 348-49 (1985) (italics added). Complainant was an officer of Respondent until he was discharged on October 1, 2002, and as such, he is arguably entitled to waive the privilege with respect to the two September 2002 meeting minutes. However, it is not necessary for me to decide at this time whether Complainant could waive the privilege in light of my determination that the statements made by Messrs. Densmore and Van Doren did not contain confidential client information and, even if they did, disclosures made to MFC waived the privilege. Respondent must therefore produce unredacted copies of these documents to Complainant.

(2) Redactions based on "regulatory privilege."

In its August 4, 2002 cover letter accompanying the documents produced for my *in camera* inspection, Respondent states:

> Please note that Respondent has redacted a small amount of material in each set of minutes that we believe is subject to the regulatory privilege of the state banking examiners. This material remains redacted. We have not confirmed the assertion of the privilege with the banking examiners; and, to my knowledge, no effort has been made to contact the agency for the purpose of requesting a waiver of that privilege. However, Claimant has not challenged the redaction of this

material or requested its *in camera* review.

*August 4, 2003 Letter to The Honorable Stephen L. Purcell* at 2. Although Respondent is correct that Complainant asked only that those "portions of the Minutes . . . found to contain materials not subject to the 'attorney[-]client privilege' [be provided to Complainant]," Motion for *In Camera* Inspection at 4, my August 1, 2003 order requiring Respondent to produce these document contained no such limitation. Furthermore, Respondent cites no statutory, regulatory, or case authority for the proposition that such information "is subject to the regulatory privilege of the state banking examiners." Nor does Respondent provide any explanation for the basis upon which such privilege, if it exists, may be asserted by Cardinal Bankshares Corporation in this case. Respondent is therefore directed to supplement its response to my August 1, 2003 order with unredacted copies of these documents *or* a further explanation of the privilege, with citations to relevant legal authorities, and the basis upon which Respondent may raise such privilege.

C. Motion for Expedited Response.

On August 12, 2003, Respondent filed a Motion for Expedited Response ("Mot. to Exp.") seeking an order requiring Complainant to respond on or before August 18, 2003 to a Second Request for Admission and Interrogatory served by Respondent on August 11, 2003. The only justification given in support of its motion is that the information requested by Respondent is "relevant and material to the claims in the case" and "Respondent will not receive responses before [the formal hearing scheduled to begin August 25, 2003 in Roanoke, Virginia] unless the time [for responding] is shortened." *Mot. to Exp.* at 1. An opposition to the motion was filed August 12, 2003 in which counsel for Complainant states he is unavailable to meet with his client throughout the remainder of this week. The opposition further states that Complainant is presently out of town and will not return until some unspecified date during the week of August 18, 2003.

Pursuant to mutual agreement of the parties, and with the court's consent, all discovery in this matter was to be concluded by 5:00 p.m. August 14, 2003. *See Joint Motion to Amend Notice of Hearing and Pre-Hearing Order* at 2. Respondent has given no valid reason for waiting until two days before all discovery in this case was to be concluded to serve its additional discovery requests. I note that Respondent has now deposed Complainant on two separate occasions, most recently on August 8, 2003. *Respondent's August 11, 2003 Letter to The Honorable Stephen L. Purcell* at 1. I further note that counsel for Complainant has identified his client as a witness who will testify at the August 25 hearing, and Respondent will thus have a full opportunity to question Complainant with respect to the matters identified in Respondent's discovery requests. Inasmuch as I have broad discretion to limit discovery in these proceedings in order to expedite the hearing, 29 C.F.R. § 1980.107(b) (2003), Respondent's motion is denied.

Based on the foregoing reasons,

**IT IS HEREBY ORDERED** that Respondent's motion *in limine* seeking the exclusion

of testimony by Professor Timothy P. Chinaris is **DENIED.**

**IT IS FURTHER ORDERED** that Complainant's motion to compel disclosure of information redacted from the September 17, 2002 and September 25, 2002 minutes of joint meetings involving Respondent's and Bank of Floyd's Audit Committees based on attorney-client privilege is **GRANTED** and Respondents are hereby directed to provide unredacted copies of said minutes to Complainant within five (5) calendar days from the date of this order.

**IT IS FURTHER ORDERED** that Respondent supplement its response to my August 1, 2003 order to produce the above-referenced minutes within five (5) calendar days from the date of this order by either producing for my *in camera* inspection those portions of the minutes which were withheld based on "regulatory privilege" or providing an adequate explanation of the privilege, with citations to relevant legal authorities, and the basis upon which Respondent may raise such privilege.

**IT IS FURTHER ORDERED** that Respondent's motion for expedited response is **DENIED.**

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STEPHEN L. PURCELL
Administrative Law Judge

Washington, D.C.